THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4355 of 2006

with

SPECIAL CIVIL APPLICATIONS No. 295 of 2001 & C.As No. 4187/06 , 5200/06 with SCAs 4012, 4013, 4014, 4023, 4025, 4356 to 4362, 4691, 4706, 4779, 4780, 4867, 4933, 5097, 5110 to 5127, 5237, 5238, 5240, 5243, 5378, 5380, 5381, 5384, 5391, 5546 to 5558, 5597, 5598, 5603 to 5605, 5617 to 5636, 5726 with CA 3892 of 2006, with SCAs 5798 to 5800, 5812, 5885 to 5890, 5903, 5906, 5908 to 5910, 6032, 6036, 6098 to 6105, 6125 to 6136, 6037 to 6039, 6078, 6093, 6094, 6119, 6123, 6152, 6155, 6272, 6354 to 6356, 6419, 6843, 6898 to 6905, 7536, 7539, 7565, 7610, 7626, 7627, 7650, 7684, 7730, 7746, 7760, 7763, 7764, 7804 to 7807, 7820, 7821, 7863, 7864, 7866 to 7869, 7873 to 7875, 7975 to 7977, 7979, 7992, 8025, 8221 to 8226, 8232, 8252, 8270, 8277, 8422, 8482 to 8492, 8522, 8532, 8554, 8557, 8692, 8693, 9589, 9590, 9610 to 9612, 9773, 10920, 11680 to 11682, 11814, 11884, 11904 to 11908, 12067, 12424, 13177 to 13184, 13337 to 13348, 13350 to 13355, 13365,13911, 14515, 14661 to 14677 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ? **1 & 2 YES; 3 to 5 NO**

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JADAV NIKESHKUMAR MAFATLAL - Petitioner(s)

Versus

STATE OF GUJARAT & 4 - Respondent(s)

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Appearance :
MR YN OZA, Ms SADANA SAGAR, PH PATHAK, MR KALPESH SHASTRI, GIRISH K PATEL, Mr Pinakin Raval, Ms.Tejal Doshi, M/s. J V Bhairavia, A M Parekh, Ms.Femina Chhapatwala, Ms. Roma Fidelis, MR Asim J Pandya, A M Raval, K Raj, I S Supehia, RK Mishra, J V Mehta, V H Desai, R C Jani, S K Gadhvi, Dhaval N Vakil, B S Brahmbhatt, A V Prajapati, V D Parghi, Haresh J Trivedi, MB Farooqui, Jayant P Bhatt, Devang D Trivedi, Paresh Upadhyay, Virendra Baheti, YV Shah, BA Vaishnav, BB Oza with Ms EE Shailaja, Kishore Paul, NR Tandel, MR Rathod, for Petitioners.
MR Mihir Joshi Advocate Genereal with Mr.KP Rawal, AGP for Respondents in the matters filed against the Sales Tax Department.
Mr Sunit Shah, G.P. and Mr K.P. Rawal, AGP and Ms Archana Raval AGP for Respondents in the remaining matters.
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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 18/09/2006

CAV JUDGMENT

1. The petitioners, numbering about 250, have approached this Court under Article 226 of the Constitution with prayers for regularization and/or reinstatement in service. They are in the grey area of government employment insofar as, though regularly employed since 2 to 28 years for manual work of the lowest grade as sweeper, water-bearer, safai kamdar, cook, driver, gardner, watchman, peon, or even typist at the higher end, they are appointed and treated as ad-hoc or temporary part-time employees having no status and no protection of any service rules. They have been employed in various offices under the State Government with fixed hours of work ranging from 2 to 6 hours, at fixed wages ranging from Rs.450/- to Rs.1350/-. While they were clamouring for regularization in service, the

government has decided to dispense with their services; which has thrown up several important issues for decision by this court. While some of the petitioners were only apprehending termination, some were protected by orders of interim relief and many are already discharged from service.

2. It is the case of the petitioners, generally, that, in absence of any recruitment rules or service rules for the appointees like the petitioners, they have been appointed and employed on part-time and ad-hoc basis on exploitative conditions of service without the usual benefits of minimum wages, allowances, leave of absence, weekly holidays, or any terminal benefits; and that they continued to work under such conditions in the hope of achieving the status of regular employees in terms of the policy and resolutions of the government itself. Many similarly situated part-time ad-hoc employees were regularized in their service pursuant to such government resolutions or by virtue of orders of this court, but in the process of waiting, most of the petitioners have crossed upper age-limits for any other employment under the government. On the other hand, the government suspended its policy of regularization of such employees, then revoked it and now it was

decided to terminate their services without following any procedure and without so much as a notice or written order.

3. As against the above grievances, the case of the respondents, as broadly articulated in the few counter-affidavits, is that the Government in its Finance Department had issued the circular dated 26.12.1980 to provide for absorption of part-time employees who had completed three years of service in the respective department; but it was discretionary, subject to the employee fulfilling the prescribed requirements for appointment in class-IV service and only as and when vacancies were available. By the subsequent circular dated 21.8.1995, the aforesaid circular dated 26.12.1980 was kept in abeyance. It was noticed by the State Government that such part-timers continued in service for a number of years, then moved the Courts for regularization of service and were required to be absorbed by virtue of the court's orders even though they did not qualify as per the recruitment rules. The subordinate offices were used to appointing a large number of part-timers leading to back-door entry in service and the government was saddled with the responsibility of pay and allowances and retiral benefits of such employees. Therefore, the government issued circulars dated 7.1.2006 to

cancel the aforesaid circulars dated 26.12.1980 and 21.8.1995; and, “with a view to obtain better service with lesser financial burden, the government decided to bring the help of outsource agency by virtue of G.R. Dated 10.2.2006”. That G.R. withdrew the power of the concerned departments to appoint part-timers as also the power of making payment from contingency funds to such part-timers.

3.1 It is further stated that there were no sanctioned posts for the work which was done by the petitioners, namely, cleaning of washrooms/ toilets etc. and such work, being fixed tasks which took very little time, was not of continuous nature requiring full-time attendance. It is also stated that, in absence of any rules, regulations or standards for appointment of part-timers, the departments were appointing persons on part-time basis as per their own perceptions and discretion. It was observed that a number of persons thus employed in the departments was rising even as, mostly, such persons were not appointed by any regular procedure, nor were there any prescribed criteria. On there being no further requirement of such persons, they were relieved from employment. It was observed that, in most such cases, the persons concerned moved appropriate courts and were granted reinstatement

and regularization. It was found by the government that that resulted in undue financial burden to the State, over-staffing and also created an opening for back-door entry into government employment, all of which were against public interest, according to the averments.

4. It is also stated on oath on behalf of the respondents that the retirement age for Class-IV employees is 60 years and the pay-scale is Rs.2550-3200. It is obvious that there would not be enough number of vacant posts for absorbing the part-timers. Simultaneously, it would also be necessary to give regular pay and allowances and retirement benefits if the government authorities have to regularize the part-timers. That caused huge additional financial burden on the State Government. With the passing of time, efficiency and quality of service rendered by part-timers was not keeping pace with the standards demanded for such work in the changing scenario and work-ethic. In these facts, the government took a policy decision to withdraw the powers of the heads of departments as well as heads of offices, in respect of appointment of part-timers and making payment to the existing part-timers. The government has also decided to outsource the services to ensure efficiency and quality with reduced financial

burden on the state exchequer. It is submitted that, in the era of resource crunch, it was the endeavour of the State Government to curtail unnecessary expenditure and towards that end it has been decided to review and abolish even the sanctioned posts in various departments. Under that policy, the State Government has abolished total 32,170 posts which included 20,016 posts in Class-III and 8,394 posts in Class-IV cadres, according to the affidavit.

5. While recounting the version of the respondents, it may be pertinent to note the recent Government Resolution dated 15.7.2006 which is issued during pendency of the present proceedings. It is stated therein that, in view of withdrawal of the powers by G.R. dated 10.2.2006, the question of sanitation and supply of water in the government offices by outsourcing the service was under consideration of the government. Since putting in place the alternative system of outsourcing may take some time, it was decided to make temporary arrangement for six months and, therefore, as an exception to the G.R. dated 10.2.2006, the heads of various offices, sections and departments are allowed to pay remuneration to part-time employees after taking their services. However, such exceptional provision will not apply to

watchman, peon-cum-driver, clerk, computer operator, xerox operator etc. and the number of employees that could be employed for cleaning or supplying water in the offices at particular level are also prescribed. It is further resolved that the surplus employees employed over and above the prescribed number of part-time employees as on 30.1.2006 were to be discharged in order of their juniority after giving them notice or wages in lieu of notice and retrenchment compensation in accordance with the provisions of the Industrial Disputes Act, 1947 (“I.D.Act” for short). This G.R. is made applicable to the employees discharged after the G.R. dated 10.2.2006 and who are continued or reinstated in service under the orders of the High Court. The employees against whom no formal orders to discharge are issued and who have not taken any legal proceedings are excluded from the benefit and procedure prescribed under the I.D.Act. Thus, the government has, pending these petitions, made some provisions for retaining or re-employing some of the part-time employees on temporary basis and for payment of notice pay and compensation in terms of the provisions of the I.D.Act, regardless of the respective departments or offices being or not being an “industry” within the meaning and definition of the I.D.Act.

6. Against the backdrop of the above broad facts and the rival pleadings, the issues arising for decision are:

(a) whether the petitioners are entitled to regularisation in service, and

(b) whether the petitioners are entitled to reinstatement or any protection from termination of their services.

Although the above two main issues are distinct, they are inter-connected at some level. The learned counsel on both sides have made detailed submissions and relied upon a number of judgments, the most important of which is the recent Constitution Bench judgment of the Supreme Court in ***Secretary, State of Karnataka and others v. Umadevi and others [(2006) 4 SCC 1]***. It may be useful and appropriate to extract, as under, the important and relevant observations made therein:

"2. .....Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated equals. Thus, any public employment has to be in terms of the constitutional scheme."

"3. .....Regular appointment must be the rule."

"4. .....The Courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. .....It is time, that Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance, tends to defeat the very constitutional scheme of public employment. ......wide powers under Article 226 of the Constitution of India are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment....."

"6. The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily.....It is recognized that no Government order,

notification or circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the constitutional scheme. .....Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed."

"12. .....This right of the Union or of the State Government cannot but be recognized and there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the needs of the situation. <u>But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment.</u> .....It is ordinarily not proper for courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme".

"13. .....In this context, we have also to bear

in mind the exposition of law by a Constitution Bench in ***State of Punjab v. Jagdip Singh & Ors. [1964 (4) SCR 964].*** *It was held therein, "In our opinion, where a government servant has no right to a post or to a particular status, though an authority under the Government acting beyond its competence had purported to give that person a status which it was not entitled to give, he will not in law be deemed to have been validly appointed to the post or given the particular status."*

"14. .....The very divergence in approach in this court, the so-called equitable approach made in some, as against those decision which have insisted on the rules being followed, also justifies a firm decision by this court one way or the other. It is necessary to put an end to uncertainty and clarify the legal position emerging from the constitutional scheme, leaving the High Courts to follow necessarily, the law thus laid down."

"15. ......If the appointment itself is in violation of the provisions of the Constitution, illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power and province of the authority, but

there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularization cannot be said to be a mode of recruitment."

"19. ......Obviously, the State is also controlled by economic considerations and financial implications of any public employment. ....So, the court ought not to impose a financial burden on the State by such directions, as such directions may turn counter-productive."

"33. .....By and large what emerges is that regular recruitment should be insisted upon, only in a contingency an ad-hoc appointment can be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularization."

"38. In ***Union Public Service Commission v. Girish Jayanti Vaghela & Others [(2006)2 SCC 482]*** *this court answered the question, who was a government servant, and stated:-*

> *"....A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the*

prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement, inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would vitiate the guarantee enshrined under Article 16 of the Constitution (See B.S.Minhas v. Indian Statistical Institute and others AIR 1984 SC 363).”

“39. .....But on survey of authorities, the predominant view is seen to be that such appointments did not confer any right on the appointees and that the court cannot direct their absorption or regularization or re-engagement or making them permanent.”

“43. ....Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution. .....Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper

competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad-hoc employees who by the very nature of their appointment, do not acquire any right. ....The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of

the constitutional and statutory mandates."

"46. ......Moreover, the invocation of the doctrine of legitimate expectation cannot enable the employees to claim that they must be made permanent or they must be regularized in the service though they had not been selected in terms of the rules for appointment."

"48. ......Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. ......There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution...."

"49. ....When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be

enforced.....”

“50. .....In the guise of upholding rights under Article 21 of the Constitution of India, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. .....The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. ......It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the constitutional scheme and the constitutional goal of equality.”

“51. The argument that the right to life protected by Article 21 of the Constitution of India would include the right to employment cannot also be accepted at this juncture. .....The Directive Principles of State Policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution.”

“52. .....This classical position continues and a

mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent."

"53. .....There may be cases where irregular appointments (not illegal appointments) as explained in ***S.V.Narayanappa (supra), R.N.Nanjundappa (supra) and B.N.Nagarjan (supra)*** *and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of*

orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

"54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents."

(emphasis added)

7. In view of the law on several aspects of the subject having been settled in the aforesaid terms by the Constitution Bench of the Apex Court, it would be unnecessary and improper to refer to and discuss any judgment of this Court or other judgments of the Supreme Court to entertain a different view. Even the resolutions

or notifications of the government suggesting a course of action inconsistent with the above observations could not be relied or enforced.

8. However, the following submissions made for the petitioners may be mentioned for the sake of record. It was submitted for the petitioners that the earlier resolution dated 20.12.1980 and the policy contained therein of making efforts to absorb the part-time employees after three years of continuous service was not fully implemented in favour of many petitioners who had been in continuous service for decades; even as many other similarly situated part-time employees in the same offices were, pursuant to that very G.R., regularized in service, which resulted into discrimination and injustice. That several orders of this court to consider the cases of similarly situated part-time employees for absorption were confirmed by the higher forum and hence, the right of similar petitioners for similar relief had crystallized. That appointments of the petitioners were not void or illegal, but they were usually made after calling the names from employment exchange and, in any case, the petitioners had no say in the method of appointment. The fact remained that the petitioners had continuously served for years under a valid contract of service and it did not

lie in the mouth of the respondents to argue that the very appointments of the petitioners were illegal, unauthorized, violative of Articles 14 and 16 of the Constitution or were ad-hoc and liable to be terminated at any time without notice. It was also submitted that, if the appointments were not against any sanctioned posts, then also, after so many years of continuous service and proved requirement of their services, it was incumbent upon the respondents to create such additional posts and absorb the petitioners thereon. That the State, as the model employer guided by the Directive Principles of State Policy, cannot be permitted to exploit the helpless employees employed at the levels below the lowest class-IV category. If the government did not make or prescribe any recruitment rules for regular selection and appointment of such staff, whose services have been proved to be necessary by their sheer continuance, they cannot take advantage of their own default and exploit such employees at the lowest rung under the hanging sword of termination. It is clear that these submissions cannot be accepted for grant of any relief in the nature of regularization or any other protection in view of the clear observations and directions of the Supreme Court extracted hereinabove.

9. As for the second related aspect of termination of service of the petitioners, whether effected, stayed or proposed, it was vehemently argued that the recent resolution dated 10.2.2006, which suddenly and unceremoniously withdrew the powers of the department concerned to engage and pay wages to the part-time employees like the petitioners, was *ex-facie* illegal and arbitrary, *mala fide* and harsh; and issued without affording to the affected persons any opportunity of being heard. It was also assailed on the basis that it could only have prospective effect and could not be utilized to discharge the existing staff just to avoid payment of their salary and substitute their services by engaging outside agency. It was submitted that the petitioners were, though styled as part-time employees, government servants and entitled, at least, to notice and an opportunity of being heard. In fact, many of the petitioners were expressly engaged for six hours a day which, practically and in reality, was full-time employment without corresponding pay and other benefits, according to the submission. It was also submitted that the government cannot legally discharge the petitioners as ad-hoc appointees just to adopt another ad-hoc arrangement for the same essential services and deprive the petitioners of their livelihood. Even

if the petitioners had no legal right which could be enforced, the Welfare State cannot act arbitrarily to snatch away even the meager source of livelihood of the petitioners, according to the submission. It was submitted that, in the peculiar facts of several cases, juniors to the petitioners were already regularized in service, whereas the petitioners were facing total ouster from service which was obviously unjust and violated the fair principle of "Last come first go". And, in any case, the government cannot be permitted to replace one set of ad-hoc or temporary employees by another set of ad-hoc or temporary employees, directly or in the name of outsourcing.

10. The learned counsel for the petitioners relied upon the judgment of the Constitution Bench of the Supreme Court in ***Olga Tellis and Others v. Bombay Municipal Corporation and Others [AIR 1986 SC 180]*** to submit that the right to life includes the right to livelihood. No person can live without the means of living and if the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. The procedure prescribed by law for the deprivation of the right conferred

by Article 21 must be fair, just and reasonable. Just as a *mala fide* act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: the action must be within the scope of the authority conferred by law and secondly, it must be reasonable. That judgment was, however, rendered in the context of eviction of pavement dwellers and it was submitted in reply by the learned Additional Advocate General that, once adequate opportunity of being heard was given in the present proceedings, the impugned action could not be set aside only on the ground of lack of opportunity or violation of principles of natural justice.

11. The petitioners also relied upon the majority view in the Constitution Bench judgment of the Supreme Court in ***Delhi Transport Corporation v. DTC Mazdoor Congress [AIR 1991 SC 101]***, wherein it is observed that the right to public employment and its concomitant right to livelihood, thus, received their succour and nourishment under the canopy of the protective umbrella of Articles 14, 16(1), 19(1)(g) and 21 of the Constitution. ***In Roshanlal Tandon v. Union of India [AIR 1967 SC 1889***], the Constitution

Bench has held that the legal position of a government servant is more one of status than of contract. Once he is appointed to the post or office, the government servant acquires a status and his rights and obligations are no longer determined by consent of both parties but by Statute or Statutory Rules. It is further observed in ***Delhi Transport Corporation*** (supra) that law is a social engineering to remove the existing imbalance and to further the progress, serving the needs of the Socialist Democratic Bharat under rule of law. The prevailing social conditions and actualities of life are to be taken into account for adjudging whether the impugned legislation would subserve the purpose of the society. The arbitrary, unbridled and naked power or wide discretion to dismiss a permanent employee without any guidelines or procedure would tend to defeat the constitutional purpose of equality and allied purposes. It is further observed in paragraph 246 that the court, as a court of constitutional conscience enjoined and is jealously to project and uphold new values in establishing the egalitarian social order. As a court of constitutional functionary exercising equity jurisdiction, it would relieve the weaker parties from unconstitutional contractual obligations, unjust, unfair, oppressive and unconscionable rules or conditions when the

citizen is really unable to meet on equal terms with the State. It has to find whether the citizen, when he entered into contract of service, was in distress, need or compelling circumstances to enter into contract on dotted lines or whether he was in a position of either to “take it or leave it” and if it finds to be so, this court would not shirk to avoid the contract by appropriate declaration. Therefore, though certainty is an important value in normal commercial contract law, it is not an absolute and immutable one but is subject to change in the changing social conditions. It was concluded by the Court that, any law made or action taken by the employer, corporate, statutory or instrumentality under Article 12, must act fairly, justly and reasonably. Right to fair treatment is an essential inbuilt of natural justice. Exercise of unbridled and uncanalised discretionary power impinges upon the right of the citizen; vesting of discretion is no wrong provided it is exercised purposively, judiciously and without prejudice. Wider the discretion, the greater the chances of abuse. Absolute discretion is more destructive of freedom than any of man's other inventions. Absolute discretion marks the beginning of the end of the liberty. The conferment of absolute power to dismiss a permanent employee is antithesis to justness or

fair treatment. The provisions of a statute, regulations or rules that empower an employer or the management to dismiss, remove or reduce in rank an employee must be consistent with just, reasonable and fair procedure. It is held that right to public employment which includes right to continued public employment till the employee is superannuated as per rules or compulsorily retired or duly terminated in accordance with the procedure established by law, is an integral part of right to livelihood which in turn is an integral facet of right to life assured by Article 21 of the Constitution. Any procedure prescribed to deprive such a right to livelihood or continued employment must be just, fair and reasonable procedure. In other words, an employee in a public employment also must not be arbitrarily, unjustly and unreasonably be deprived of his/her livelihood which is ensured in continued employment till it is terminated in accordance with just, fair and reasonable procedure. Otherwise, any law or rule in violation thereof is void.

11.1 Referring to the above judgment of **Delhi Transport Corporation** (supra), it was submitted in reply that it was a case of permanent government servants in the context of which the observations were made and hence, they did not

apply to such part-time employees as the petitioners.

11.2 *Kumari Shrileka Vidyarthi v. State of U.P. [AIR 1991 SC 537]* was relied upon to submit that the expression 'professional engagement' was used to distinguish it from 'appointment to a post under the Government' in the strict sense. That, however, did not necessarily mean that a person who was not a government servant holding a post under the government did not hold any public office and the engagement was purely private with no public element attaching to it. The power to terminate the appointment *"without assigning any cause"* cannot be equated with *"without existence of any cause".* It was held that 'office' or 'post' of D.G.S. had a public element which alone was sufficient to attract the power of judicial review for testing validity of the impugned circular on the anvil of Article 14, though the matter was purely contractual. The constitution did not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. It is, however, also held by the Apex Court that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also

in contractual matters. Referring to that judgment, it was submitted for the respondents that there was, in that case, no reasonable basis for the drastic and sweeping action throughout the State; whereas, in the facts of the present cases, Article 14 was not attracted at all and the right to terminate without notice the employment of ad-hoc employees was upheld by the Supreme Court.

12. The aspect of termination of service without notice and without following any procedure was also assailed on the ground that the petitioners were covered by the minimum protection provided by the provisions of the Gujarat Civil Services Rules. The relevant provisions of the GCSR may be quoted as under:

> **"2. <u>Extent of application</u>:**
>
> *Except where it is otherwise expressly or impliedly provided, these rules shall apply to-*
>
> *(a) all members of services and holders of posts whose conditions of service; the Government of Gujarat is competent to prescribe, and*
>
> *(b) the person in respect of whose service conditions, pay and allowances and pension or any of them, special provision has been made under an agreement, in respect of any matter not covered by the provisions of such*

agreement."

"5. <u>Validity of terms of contract</u>:
The terms and conditions of a specific contract enforceable at law entered into by the Government with any person relating to service shall prevail over the provisions of these rules"

"35. Termination of services of a temporary <u>Government employee</u>:
The service of a temporary Government employee shall be liable to termination at any time by a notice in writing given to him by the appointment authority."

12.1 It was argued that there was nothing to exclude the petitioners from the definition of "temporary government servant" and the provisions of issuing notice or paying notice pay were mandatory. Relying upon the unreported Division Bench judgment dated 2.3.2000 of this Court in L.P.A. No.260 of 1996, it was submitted that members of worked-charged establishment were held to be governed by the provisions of the BCSR as 'government servants' and termination of their service without notice was held to be void.

13. As against that, the learned Additional Advocate General submitted that Rule 35 and, in fact, the whole of the GCSR did not apply to the facts of the petitioners' case since they were neither in permanent nor temporary employment of the government. They were governed by the

specific terms of their appointment providing for termination at any time which would in any case prevail over the provisions of the GCSR, according to the submission.

14. The judgment in the ***Manager, Government Branch Press v. D.B.Belliappa [AIR 1979 SC 429]*** was relied upon to submit that the protection of Articles 14 and 16 (1) would be available even to a temporary government servant whose service was terminated in accordance with the terms and conditions of his service, if he were arbitrarily discriminated against and singled out for harsh treatment in preference to his similarly circumstanced juniors. Though it was true that the competent authority had the discretion under the conditions of service governing the employee concerned to terminate his employment without notice, such discretion had to be exercised in accordance with reason and fair play and not capriciously. Bereft of rationality and fairness, discretion degenerates into arbitrariness which is the very antithesis of the rule of law on which our democratic polity is founded. Arbitrary invocation or enforcement of a service condition terminating the service of a temporary employee may itself constitute denial of equal protection and offend the equality clause in Articles 14 and 16 (1). It is also

observed by the Apex Court that, if the service of a temporary government servant were terminated arbitrarily, and not on the ground of his unsuitability, unsatisfactory conduct or the like which would put him in a class part from his juniors in the same service, a question of unfair discrimination may arise, notwithstanding the fact that in terminating his service, the appointing authority was purporting to act in accordance with the terms of the employment. Where a charge of unfair discrimination is levelled with specificity, or improper motives are imputed to the authority making the impugned order of termination, it is the duty of the authority to dispel that charge by disclosing to the court the reason or motive which impelled it to take the impugned action.

It was submitted in reply for the respondents that, apart from absence of any factual basis for the allegation of discrimination, regularization of junior employees in a few cases happened due to orders of the court, which could not be made the basis for the plea of discrimination. And, in any case, the petitioners were not singled out for harsh treatment in preference to the similarly circumstanced juniors or other employees.

15. It was submitted by the learned Additional Advocate General, appearing for the respondents, that the petitioners were admittedly appointed on ad-hoc and part-time basis and they had never held any post under the government. Therefore, their rights and status cannot be better or higher than those of daily rated temporary or ad-hoc employees. Their services were expressly made liable to be terminated at any time without notice. That the government had *bona fide* taken a policy decision to reduce such staff which was in excess and not required for efficient working of the offices under the State Government. The consistent practice of employing such part-timers, on temporary basis, by the offices and departments concerned and then such employees approaching the court for regularization on full-time and permanent basis was creating a huge burden on the state exchequer on the one hand and, on the other hand, such indirect induction into government employment is by now clearly held to be unconstitutional. Therefore, the policy and actions of the government of terminating such employees were required to be upheld as constitutional and in public interest. He further submitted that, in order to ensure that the employees concerned could absorb the impact of termination and re-adjust their lives, the

Government had, as a Welfare State and model employer, issued the recent G.R. dated 15.7.2006 whereunder some of the part-time employees may be continued in service for some time and all of them may be entitled to the terminal benefits at par with their counterparts outside the canopy of government employment, even though the respective office employing the petitioners may not be an “industry” within the meaning of the I.D.Act. It was already clarified earlier by the learned Advocate General that such of the petitioners as were discharged from service and were entitled to any protection under any of the labour laws, were free to approach such forum under such laws as may be available to them. In such circumstances, it would not be just and proper for this court to exercise its discretionary jurisdiction under Article 226 of the Constitution to restore the position of large scale illegal appointments on any technical ground or only for compliance of the formality of notice, according to the submission.

15.1 On the legal aspect of termination, it was submitted on behalf of the respondents that the petitioners were not appointed on or against any post and, therefore, they were not entitled to notice at par with other temporary government servants. Relying upon the recent decision of

the Supreme Court in ***Union Public Service Commission v. Girish Jayanti Vaghela and others [(2006) 2 SCC 482],*** it was submitted that, where appointment had been made without issuing public advertisement, the contractual appointment was held to be *de hors* the rules. It was held that the appointment made in a manner which could not remotely be said to be compliant with Article 16 of the Constitution and it being purely contractual, the stage of acquiring the status of a government servant had not arrived. Relying upon the judgment of this Court in ***Jashwantkumar J. Desai v. Sabarkantha District Panchayat [2001 (2) G.L.H. 162]***, it was submitted that the condition that service could be terminated without notice prevailed over any rule to the contrary, including Rule 33 (1) (b) of the BCSR which was equivalent to Rule 35 of the GCSR. ***State of U.P. v. Neeraj Awasthi and others [(2006) 1 SCC 667]*** was relied upon for the observation in paragraph 47 thereof that the principle of natural justice would be attracted only when the services of some persons were terminated by way of a punitive measure or thereby a stigma was attached; and, to submit that, in absence of sanctioned posts, normally, directions for reinstatement should not be issued. And, ***A.Umarani v. Registrar, Co-operative Societies and Others [(2004) 7 SCC 112]*** was

relied upon for the observation, as under, in paragraph 65 thereof:

> "65. *We are also of the opinion that in a case of this nature, where the validity or otherwise of a government order is in question, the principles of natural justice will have no role to play and in any event recourse thereto would result in futility."*

It was also submitted on the basis of the observations made by the Supreme Court in ***BALCO Employees' Union (Regd.) v. Union of India and Others [(2002) 2 SCC 333]*** that, it was the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality was committed in the execution of the policy or the same was contrary to law or *male fide*, a decision bringing about change could not *per se* be interfered with by the court. It was neither within the domain of the courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy was wise or whether better public policy could be evolved. Nor were the courts inclined to strike down a policy at the behest of a petitioner merely because it had been urged that a different policy would have been fairer or

wiser or more scientific or more logical. Wisdom and advisability of economic policies were ordinarily not amenable to judicial review unless it could be demonstrated that the policy was contrary to any statutory provision or the Constitution.

16. Having regard to the facts and contentions adumbrated hereinabove, it is obvious that, factually, the petitioners were, at best, part-time temporary employees rendering continuous service for years on end without being duly selected and appointed in compliance with the letter and spirit of Articles 14 and 16 of the Constitution. Therefore, despite a prolonged unblemished service, no right or entitlement to absorption, regularization or protection against termination has accrued to them under the law now settled by the Supreme Court, although termination of their service on the basis of a policy decision taken by the Government may appear to be harsh and unjust from the point of view of an individual employee.

16.1 The other aspect of the matter is that, undisputably, the petitioners have been in employment of the government for years and the action of termination of their service necessarily involves civil consequences and

deprivation of their livelihood. As observed by the Constitution Bench of the Supreme Court in ***Delhi Transport Corporation*** (supra), any procedure by which an employee is deprived of his livelihood must be just, fair and reasonable; and an employee in public employment cannot be arbitrarily, unjustly or unreasonably deprived of his livelihood. It must be noted that, while the recent judgment of the Constitution Bench of the Apex Court in ***Secretary, State of Karnataka v. Umadevi (supra)*** marks the watershed and completely covers the subject of absorption and regularization, termination of service was not the subject-matter in that case. And the action of any authority under the State can always be challenged as arbitrary, even though the petitioner, in a given case, may not have an enforceable right to a relief by way of a writ of mandamus. In the facts of these cases, it is not the State which has sought a declaration that the appointments of the petitioners were illegal and unconstitutional and, therefore, required to be quashed. It is the employee who has approached the Court to challenge the action or proposed action of termination of service on the grounds, *inter alia*, that it is arbitrary, unjust and unfair. The plea of illegality or irregularity of the appointments is taken as a defence against the demand of regularization and reinstatement or

protection against termination. It is not axiomatic that if an appointment were held or found to be illegal, the termination of service rendered pursuant to such appointment could only and always be legal. In most of the cases, appointments may be illegal in the sense that they were made in violation of Article 16 of the Constitution, they may be irregular in the sense that they were not in consonance with any recruitment rules and, as a result, such appointments and employment did not confer any right or status. If that also confers a corresponding right upon the respondents to continue such employment till they want and terminate it as and when they like, in an arbitrary and capricious manner, it would require acceptance of complete lawlessness on the part of the State as an employer.

16.2 It is not the case of the respondents that the petitioners were being discharged from service in exercise of the power to terminate their services at any time without notice, reserved in the appointment order, or on expiry of the term for which the petitioners were appointed or on account of the work being not available. Requirement or proposal of regular recruitment for the same services is also not the reason. By the very fact that the contract of

service subsisted for many years with tacit consent of both the parties, it could not be branded and abrogated as *non est* or void. Since one of the parties to such contract is the government or an "*authority*" within the meaning of Article 12 of the Constitution and the question of livelihood of other parties is involved, it is all the more necessary that the policy and the proposed action of mass termination of service are tested on the touchstone of justness, fairness and reasonableness of the procedure by which the policy is sought to be implemented. The G.R. dated 10.2.2006 issued by the Finance Department withdrawing the power of the concerned departments to appoint and pay to the part-timers from contingency fund not only completely overlooked the fate and predicament of hundreds of part-time employees employed since long years but also disregarded the department's own requirement of their services. The resultant unceremonious termination of service without so much as a notice or a written order could hardly be regarded as termination by a just, fair, or reasonable procedure. One of the stated reasons for adopting the policy of outsourcing the services was to reduce the prospective huge financial burden arising out of absorption or regularization of part-time employees into

regular service. That apprehension could no longer survive in view of the above-quoted recent Constitution Bench decision of the Apex Court.

16.3 Therefore, but for the post-decisional hearing before this Court and the offer of re-employment for some for some time and the offer of notice pay and compensation for the rest, the action of termination could be held to be arbitrary, unjust and unfair. However, again in view of the observations of the Hon'ble Apex Court in ***Secretary, State of Karnataka v. Umadevi (supra)*** the petitioners could not necessarily be granted the relief of reinstatement even in such circumstances. Nor is there now the question of their regularization in service or reinstatement or continuation in service, even if they were full-time temporary employees. Nor is it possible to hold, in the facts of the present cases, that the inaction of the respondents in not regularizing their services and the decision to, directly or indirectly, terminate their services were otherwise illegal or *mala fide.*

16.4 The fact of an employee being employed as a part-time employee does not make any difference insofar as he remains an employee at least in terms of the express or implied contract of service and continues to be entitled to

fundamental rights as a citizen. Therefore, if his rights cannot be better than those of a temporary or ad-hoc employee, they cannot be worse either. If a temporary or ad-hoc employee were entitled to notice or notice pay as a part of fair procedure, a part-time employee would as well be entitled to notice unless it is waived or made redundant by way of an express condition of service overriding the rules. In that view of the matter, the question whether the provisions of the GCSR apply to such part-time temporary employees or not, recedes into the background and becomes irrelevant.

17. In the above circumstances, the recent resolution dated 15.7.2006 of the Government is held to be fulfilling the constitutional requirements of fairness and preambular promise of socio-economic justice in action and it is required to be fully and uniformly implemented so as to partly take care of the shock and suffering of the employees whose services have been abruptly terminated, or who are facing termination by virtue of the earlier resolution dated 10.2.2006.

17.1 However, the cases of the petitioners who have been in service for more than ten years against duly sanctioned vacant posts are on a

different footing and they are required to be considered on different basis in light of the observations made in paragraph 53 of the judgment of the ***Secretary, State of Karnataka v. Umadevi (supra).*** There is already for them the direction of the Supreme Court that the State Governments and their instrumentalities should take steps to regularize, as a one-time measure, the services of such irregularly appointed employees who have worked for ten years or more in duly sanctioned posts, but not under the cover of orders of Courts or Tribunals. Since many of the petitioners employed for more than ten years and for six hours or more per day are stated to have worked against sanctioned posts, the respondents are required to consider such cases on the basis of the facts and circumstances of each case. It may be pertinent to add and observe that the State Government, while prescribing the minimum rates of wages in scheduled employment under the Minimum Wages Act, 1948, usually provide for payment of full wages in case the hours of work exceed five hours per day. Therefore, ideally, a part-time employee working for six or more hours per day since more than ten years should be considered as a full-time employee for the benefit of regularization, if he is otherwise eligible and covered by the exceptional clause and directions contained in paragraph 53, as

mentioned hereinabove. Age-bar cannot, in the nature of things, be invoked in consideration of such cases and for effectuating the mandate. Since the averments in particular petitions of the petitioner actually working full time, though treated and branded as a part-timer, are neither substantiated nor specifically traversed, the respondents have to be left to consider such cases in light of actual facts and the above direction of the Hon'ble Apex Court.

18. Accordingly, subject to the above observations and directions to consider the cases of the eligible employees under the direction of the Supreme Court contained in paragraph 53 of the judgment in ***Secretary, State of Karnataka v. Umadevi [(2006) 4 SCC 1],*** the prayers for the relief of regularization are denied. As far as the grievance against termination of service and prayers for reinstatement or protection against termination are concerned, they are disposed with the direction to the respondents to comply with the G.R. dated 15.7.2006 and pay to such petitioners who are already discharged and not re-employed or proposed to be discharged, the amounts of notice pay and compensation in terms of the said G.R. Protection or injunction against termination of service is denied with the clarification that it should not be understood to

mean that all the petitioners whose services are required and who are presently in service, with or without an interim injunction of the court, have to be necessarily discharged by the respondents. Since *raison d'etre* and justification for the apprehension of huge future liabilities in respect of such employees are removed by the Constitution Bench judgment of the Supreme Court in ***Secretary, State of Karnataka v. Umadevi (supra)***, the respondents may as well consider the issue of redefining the term and conditions of such contracts of service on a just and reasonable basis.

Rule is made absolute only to the aforesaid extent, with no order as to costs. Interim relief, in whichever matters it is operating, stands vacated. The civil applications are disposed as not surviving in line with this judgment.

Sd/-

(D.H.WAGHELA, J.)

Upon pronouncement of the above judgment, it was requested by the learned counsel appearing for the petitioners that the interim relief which was granted earlier in several petitions may be continued and extended at least for a period of four weeks. Learned A.G.P. Mr.Rawal has objected.

In view of the above final decision after full hearing, there is no justification for extending the interim relief and, therefore, the request is rejected.

Sd/-

(D.H.WAGHELA, J.)

(KMG Thilake)